

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 141

Docket No. DC-0752-05-0760-I-1
DC-0752-06-0094-I-1

**Valencia Martin Wallace,
Jacinta M. Martin,
Appellants,
v.
Department of Commerce,
Agency.**

June 4, 2007

Peter B. Broida, Esquire, Arlington, Virginia, for Appellant Wallace, and
George M. Chuzi, Esquire, Washington, D.C., for Appellant Martin.

Susan Kane, Esquire, Arlington, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Vice Chairman Rose recused herself and did not take part in this decision.

OPINION AND ORDER

¶1 The appellants petition for review of the June 9, 2006 initial decision which affirmed the agency's removal of Valencia Martin Wallace from her Supervisory Patent Attorney position and the removal of Jacinta M. Martin from her Human Relations Specialist (Information Systems) position. For the reasons set forth below, we GRANT the petition for review and REVERSE the appellants' removals.

BACKGROUND

¶2 In May 2003, the agency detailed appellant Valencia Martin Wallace, a GS-15 Supervisory Patent Examiner with the agency's Patent and Trademark Office (PTO), to the position of Deputy Operations Manager of the PTO's Office of Human Resources (OHR). Wallace Appeal File (WAF), Tab 7, Subtab 4bf. In January 2004, the agency posted vacancy announcement PTO-04-010 (010 announcement) for a Human Resources Specialist (Information Services), *id.*, Subtab 4e at 5-10, and appellant Jacintha M. Martin, Wallace's sister, applied for the position, *id.*, Subtab 4ay. Because one of the applicants for the advertised position was her sister, Wallace notified Bo Bounkong, Senior Advisor to JoAnne Barnard, the Chief Financial and Administrative Officer (CFO/CAO) of the PTO, that she was recusing herself from any input or involvement in the hiring process for the position and further sought Bounkong's guidance on how to ensure that a fair and impartial selection could occur. *Id.*, Subtab 4d at 30-31. Bounkong agreed that Wallace should remove herself from the hiring process involving her sister and arranged with Barnard to conduct the selection process in the CFO/CAO's office, with Bounkong to serve as the selecting official and as one member of the interview panel, which also included two other senior agency officials. Hearing Transcript, May 24, 2006 (HT 5/24) at 159-60, 164. Because the position was in Wallace's chain of command, Barnard and Bounkong also discussed what to do if Martin was selected for the position. *Id.* at 160. In order to avoid any appearance of impropriety in the event Martin was selected for the position under Wallace's authority, they decided that, if selected, Martin would be detailed to the Office of Finance, outside of the OHR chain of command, for the short time remaining until Wallace left her OHR detail to return to her position in the patent corps. *Id.* at 161. In March 2004, the panel conducted

interviews with several¹ candidates and found Martin to be the best qualified candidate for the position, but Bounkong ultimately made no selection under the 010 announcement due to problems contacting Martin's references, and the agency subsequently cancelled the vacancy announcement. WAF, Tab 7, Subtab 4aa at 3. Meanwhile, the agency detailed Wallace to the post of Acting Operations Manager of OHR, making her the PTO's chief personnel officer. *Id.*, Subtabs 1 at 2-3, 4ax.

¶3 Because Bounkong knew that the agency still needed to fill the position, she told Wallace that the selection process would be returned to Audrey Britt, who was the acting chief of OHR's Policy and Automation Branch. HT 5/24 at 173-77. Bounkong understood that Britt was the natural choice to be the selecting official if the selection process occurred in OHR because Britt was the acting chief of the branch to which the agency would ultimately assign the selectee. Hearing Transcript, May 23, 2006 (HT 5/23) at 216; HT 5/24 at 181-82. The agency re-advertised the position under vacancy announcement PTO-04-115 (115 announcement), WAF, Tab 7, Subtab 4au, and Martin re-applied for the position, *id.*, Subtab 4at. Britt ultimately selected Martin for the position and Martin's appointment became effective on October 17, 2004. *Id.*, Subtabs 4ao, 4aq-4ar. The record indicates that, upon her appointment, the agency immediately detailed Martin for a period not-to-exceed 120 days from the OHR to a position in the PTO's System Development & Maintenance Service, Corporate System Support Branch. *Id.*, Subtab 4ap.

¶4 On December 2, 2004, the agency's Office of Inspector General (OIG) initiated an investigation in response to anonymous allegations that Wallace had

¹ Bounkong's January 2005 affidavit to the Office of Inspector General stated that, "[t]o the best of her recollection, the panel interviewed four candidates[,]" WAF, Tab 7, Subtab 4aa at 3, but her hearing testimony was that the panel interviewed six or seven candidates, HT 5/24 at 164.

improperly hired her sister to a position in her chain of command and had rewarded those employees who were directly involved in the selection process with promotions, pay increases, and bonuses. WAF, Tab 7, Subtab 4q. The OIG's May 5, 2005 report asserted that its investigation substantiated Wallace's improper involvement in the hiring of her sister. *Id.* On June 6, 2005, James Matthews, Director of OHR, proposed that Wallace be removed from the federal service based on four charges: (1) Conduct unbecoming a federal employee; and violations of (2) 5 C.F.R. § 2635.502 (one of the "Standards of Ethical Conduct for Employees of the Executive Branch"); (3) 5 U.S.C. § 3110 (which restricts the employment of relatives); and (4) 5 U.S.C. § 2302 (which designates a violation of § 3110 as a prohibited personnel practice). *Id.*, Subtab 4l.

¶5 In support of the first charge, conduct unbecoming a federal employee, the agency alleged that Wallace had advised her subordinate, Donna Grace, that Martin was interested in working at the PTO and had asked Grace if Martin could use a previous application to apply for other openings. WAF, Tab 4, Subtab 4l at 4. The agency alleged that these actions were the impetus for Grace to submit Martin's 010 announcement application for consideration under the 115 announcement and constituted improper advocacy by Wallace of Martin's employment. *Id.* The agency's first charge further alleged that Wallace asked Britt who would serve on the interview panel for the position for which Martin had applied, that Wallace approved Britt's selection of Martin, and that Wallace both failed to seek ethics advice regarding her sister's hiring and led agency officials to believe that Wallace had cleared Martin's hiring with PTO's Office of General Counsel (OGC). *Id.* at 5. Lastly, the first charge alleged that Wallace used her position in OHR to hire her sister into a position within her chain of command and violated laws and regulations in the hiring of her sister. *Id.* In support of the second charge, the agency specified that, because Wallace circumvented the controls put in place by the CFO/CAO's office for the 010 position and failed to recuse herself, maintaining a position of direct authority

over each subordinate involved in filling the position under the 115 announcement, she failed to ensure objectivity and impartiality in the discharge of her official duties in violation of 5 C.F.R. § 2635.502. *Id.* at 5. The second charge also reiterated several of the first charge's specifications, namely, that Wallace told her subordinates of Martin's interest in the position, inquired about the composition of the interview panel, and failed to seek legal and ethics advice. *Id.* In support of the third and fourth charges, the agency specified that Wallace had maintained direct authority over each of the subordinates involved in the selection process for the 115 announcement. *Id.* at 6. The third charge also specified that Wallace advocated for Martin's appointment by advising Grace that Martin was interested in the position and that Wallace improperly affirmed Britt's tentative selection of Martin to a position in Wallace's chain-of-command. *Id.* The fourth charge specified that Wallace advocated for Martin's appointment by referring Martin to a subordinate, Britt, for consideration for a promotion under the 115 announcement, and by affirming Britt's tentative selection of Martin. *Id.* at 6. On July 12, 2005, Matthews also proposed the cancellation of Martin's appointment to the position because it was allegedly made in violation of 5 U.S.C. §§ 3110 and 2302. Martin Appeal File (MAF), Tab 1.

¶6 Vickers Meadows, who took over from Barnard as CAO of the PTO on May 2, 2005, HT 5/24 at 230-31, issued an August 25, 2005 decision which sustained the charges against Wallace and removed her effective August 29, 2005. WAF, Tab 7, Subtab 4b. Wallace filed a timely mixed-case appeal alleging that the agency discriminated against her on the basis of sex and arguing, among other things, that the agency's action was unsupported by preponderant evidence and that the penalty was too harsh in the event any of the charges against her were sustained. WAF, Tab 1.

¶7 On October 18, 2005, Matthews issued three letters to Martin. MAF, Tab 1. The first letter informed Martin that the agency was cancelling her appointment because Matthews found that it was made in violation of 5 U.S.C. §§ 3110 and

2302, and it advised Martin of her appeal rights to the Board. *Id.* The second letter notified Martin that, because her appointment was in violation of 5 U.S.C. § 3110, she was not entitled to pay under the appointment and that she would receive a bill directly from the National Finance Center for the salary she received during the term of her illegal appointment. *Id.* The third letter noted that the agency must remove all references to the appointment from Martin's official personnel folder (OPF) and offered her the option of the inclusion of a "transcript of service," which would have explicitly stated that she had been illegally appointed, if she wanted "to have the service recorded in [her] OPF to use for qualifications purposes in the future." *Id.* Martin also filed a timely mixed-case appeal of her removal, alleging that the agency discriminated against her on the bases of sex and retaliation for prior EEO activity. *Id.* The administrative judge (AJ) consolidated Martin's and Wallace's appeals on December 1, 2005. WAF, Tab 55; MAF, Tab 4. The AJ merged the four charges against Wallace into two charges; he merged the charged violations of 5 U.S.C. §§ 3110 and 2302 into one charge, because the two statutes proscribe the same conduct, and he merged the charged violation of 5 C.F.R. § 2635.502 with the "conduct unbecoming a federal employee" charge into a second charge because those charges were based on the same alleged misconduct. WAF, Tab 74 at 2.

¶8 After holding a hearing, the AJ found as follows:

Wallace, both by her actions, (i.e., alerting Grace to Jacintha Martin's continuing interest in the position, permitting the hiring process to take place in OHR with a selection panel composed entirely of her subordinates, allowing Britt to make the selection, and personally reviewing Jacintha's employment application) and inactions (i.e., failing to advise her superiors—Boukong and Barnard—prior to the selection that Jacintha had in fact reapplied for the position) must be considered to have "advanced," "promoted," and "advocated" the employment of Jacintha Martin to the position in question. Moreover, by giving her (implicit) approval to the selection panel created by Britt and reviewing Jacintha's application after Britt told her that she had selected Jacintha, Martin Wallace plainly 'endorsed' the employment of her sister. Such

“endorsement” also constitutes a form of “advocacy” in violation of 5 U.S.C. § 3110.

WAF, Tab 84, Initial Decision (ID) at 9-10. The AJ also found that the circumstances presented would cause a reasonable person with knowledge of the relevant facts to question Wallace’s impartiality, such that her actions constituted conduct unbecoming a federal employee and created an appearance of a conflict of interest in violation of 5 C.F.R. § 2635.502(a). ID at 10. Regarding Martin’s appointment, the AJ found that the agency properly cancelled Martin’s appointment because Wallace had advocated her sister’s employment in violation of 5 U.S.C. § 3110, and the statute “provides that an employee may not retain an appointment so acquired.” ID at 12. Finally, the AJ found that the appellants failed to prove their affirmative defenses and that Wallace’s penalty was reasonable for the sustained charges and promoted the efficiency of the service. ID at 12-22. The appellants filed a timely petition for review (PFR) contesting the AJ’s findings, Petition for Review File (PFRF), Tab 6, and the agency filed a timely response in opposition to the PFR, *id.*, Tab 11.

ANALYSIS

¶9 Section 3110(b) of title 5, United States Code, provides as follows:

A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.

As an initial matter, we note that the agency did not “remove” Martin; instead, it cancelled her allegedly illegal appointment. Thus, there may be some question as to whether the agency’s actions with respect to Martin’s appointment constitute a “removal” for the purposes of the Board’s jurisdiction under chapter 75 of title 5,

United States Code. While the parties did not contest the Board's jurisdiction over the cancellation of Martin's appointment, the Board must satisfy itself that it has jurisdiction over an appeal. *See Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996) ("As a limited jurisdiction tribunal, the Board must satisfy itself that it has authority to adjudicate the matter before it, and may raise the matter of its own jurisdiction sua sponte at any time."). Nevertheless, having considered the issue, we find that the evidence establishes that the cancellation of Martin's allegedly illegal appointment constitutes a removal within the Board's jurisdiction. Regardless of the label the agency attached to its action, the Board has found that an employee otherwise entitled to adverse action procedures whose appointment is cancelled as unlawful is not deprived of any procedural or appeal rights to which she is entitled unless the appointment was contrary to an absolute statutory prohibition such that the appointee was not qualified for appointment in the civil service. *Daneshpayeh v. Department of the Air Force*, 57 M.S.P.R. 672, 676 (1993), *aff'd*, 17 F.3d 1444 (Fed. Cir. 1994) (Table). Martin was otherwise entitled to adverse action procedures because she was an individual in the competitive service who, at the time that the agency cancelled her appointment, had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. MAF, Tab 1; Tab 5, Subtab 4ao; *see* 5 U.S.C. § 7511(a)(1)(A)(ii). There is no evidence in the record to support a finding that Martin was not qualified for appointment in the civil service or that, in the absence of nepotism, she was not qualified for appointment to the particular position to which the agency appointed her. Furthermore, even if the agency appointed Martin in violation of 5 U.S.C. § 3110(b), the statutory subsection that prohibits appointments in which a public official has engaged in nepotism, the prohibition contained within that subsection is not absolute. That is, it did not prohibit Martin's appointment to the position under all circumstances; it merely prohibited it under a narrowly defined set of circumstances. Accordingly, we find that Martin's appointment was not contrary

to an absolute statutory prohibition and that the record establishes that the agency's cancellation of Martin's appointment constituted the removal of an employee otherwise entitled to adverse action procedures for the purposes of the Board's jurisdiction under chapter 75 of title 5.

¶10 Having disposed of this jurisdictional issue, we proceed to a consideration of the merits of the agency's charges against the appellants. A recurring theme of the agency's charges against Wallace is that she served as the PTO's chief personnel officer at the same time that her subordinates in OHR selected Martin. WAF, Tab 7, Subtab 4*l*. The agency's second, third, and fourth charges all alleged that Wallace "continued to maintain a position of direct authority over each subordinate involved in the handling of the case[.]" *Id.* However, Wallace's maintenance of such a position did not, standing alone, constitute any of the actions ("appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement") necessary to violate the statutes which prohibit nepotism with respect to federal employment. *See* 5 U.S.C. §§ 2302(b)(7) and 3110(b).

¶11 In fact, prior to being abolished, the Federal Personnel Manual (FPM)² specifically provided, "The relative of a public official may be appointed by a subordinate of the official if the official is in no way involved in the action and if the agency concerned has no regulations prohibiting such employment." FPM, Chapter 310, Subchapter 1-3(b)(1) (1988). The agency did not charge the appellant with violating agency regulations, and it presented no testimony from any of Wallace's subordinates that she was actually involved in the hiring process for the position advertised in the 115 announcement. Significantly, Grace and Britt, the subordinates of Wallace who were most closely involved in the process

² The FPM was abolished on December 31, 1993; however, it may be relied upon for useful guidance in appropriate circumstances. *See Drury v. Office of Personnel Management*, 79 M.S.P.R. 493, ¶ 8 (1998).

that resulted in Martin's appointment, both testified that Wallace was not involved in the hiring of her sister. Grace testified that Wallace "stayed completely outside of the process" with respect to Martin's application for the 115 announcement. HT 5/23 at 178. Further, Grace testified that Wallace never told her to do or not to do anything with respect to the 115 announcement and that Wallace neither approved nor disapproved of any decisions that Grace made with respect to the advertised position. *Id.* Britt also testified that Wallace did not tell her to do or not to do anything relative to the 115 announcement and that Wallace made no recommendations or comments to her regarding Britt's handling of the selection process for the position. HT 5/23 at 245. The agency therefore has failed to establish that Wallace's mere presence in the chain of command at the time Britt selected Martin for the advertised position constitutes a violation of the statutes prohibiting nepotism. Accordingly, in order to determine whether the agency proved its charges, we must examine whether the agency established that Wallace acted in a manner proscribed by the statutes or regulation cited in the proposal notice or in a manner unbecoming a federal employee.

¶12 In the notice of proposed removal, the agency alleged that the actions Wallace took in violation of the anti-nepotism statutes included advocating in favor of Martin's appointment to a position within the agency and approving Britt's selection of Martin. WAF, Tab 7, Subtab 4l. The agency contended that Wallace's advocacy and approval of Martin's appointment occurred during one conversation with Grace and during two conversations with Britt. *Id.* Even though "approval" of an appointment, employment, promotion, or advancement is not listed among the actions which the statute proscribes, the AJ found that Wallace had approved Martin's appointment by reviewing Martin's application and asking Britt if she made the selection properly. ID at 8. Beyond the advocacy and approval specified in the agency's charges, the AJ also found that Wallace's implicit approval of the selection panel for the 115 announcement, along with her alleged review of Martin's application, amounted to an

“endorsement” of Martin’s selection which also constituted advocacy in violation of 5 U.S.C. § 3110. ID at 9-10.

¶13 The agency alleged that, during the conversation with Grace, Wallace advised Grace that Martin was interested in applying for the position under the 115 announcement and then asked whether Martin could use the same application for the 115 announcement that she had submitted for the 010 announcement. WAF, Tab 7, Subtab 4l at 6-7. The agency’s first charge alleged that Wallace “asked Ms. Grace if [Martin’s] application from a previous vacancy announcement could be used to apply for other job openings” and that “[a]s a result of this discussion, Grace submitted [Martin’s] application from announcement PTO-04-010 for consideration under vacancy announcement PTO-04-115.” *Id.* at 4. Further, the agency’s fourth charge alleged that Wallace “referred [her] sister to a subordinate, Ms. Britt, for consideration for a promotion under vacancy announcement PTO-04-115,” *id.* at 6, presumably through her alleged inquiry to Grace regarding reusing Martin’s previous application for the new vacancy announcement. The regulations in effect at the time of the alleged referral provided, in pertinent part, that “a public official who recommends a relative, or refers a relative for consideration by a public official standing lower in the chain of command, for appointment, employment, promotion, or advancement is deemed to have advocated the appointment, employment, promotion, or advancement of the relative.”³ 5 C.F.R. § 310.103(c)

³ Although part 310 of title 5 of the Code of Federal Regulations has since been amended to delete this language, 70 Fed. Reg. 20,457 (April 20, 2005), the quoted language was in effect during the period relevant to this appeal. Nevertheless, OPM’s authority to issue the regulations set forth at 5 C.F.R. §§ 310.101-310.103 does not derive from the anti-nepotism statute, 5 C.F.R. § 3110, but instead derives from the general authority granted to OPM under 5 U.S.C. § 1104. The anti-nepotism statute only grants OPM authority to prescribe regulations authorizing temporary employment, in the event of emergencies resulting from natural disasters or similar unforeseen events or circumstances, that would otherwise be prohibited by 5 U.S.C. § 3110. 5 U.S.C. § 3110(d); *see Alexander v. Department of the Navy*, 24 M.S.P.R. 621, 624 n.4 (1984). Thus, there may be some question as to the amount of deference the Board should

(2005). In sustaining the agency's charges, the AJ found that Grace repeatedly stated on direct and cross examination that Wallace told her that Martin was interested in reapplying for the position. ID at 8. The AJ further held, "In light of Grace's consistent sworn statements and testimony in this regard, I find Wallace's contention that it was Grace who approached her to ask whether [Martin] was interested in the position to be not credible." *Id.*

¶14 The Board must give deference to an AJ's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Sufficiently sound reasons to overturn an administrative judge's demeanor-based credibility determinations include circumstances when the judge's findings are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole. *Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004). Based on the analysis set forth below, we find that the record here provides sound reasons to overturn the AJ's credibility determinations regarding this conversation between Grace and Wallace.

¶15 On January 7, 2005, Grace signed an affidavit for the OIG's investigation which stated that, sometime during the Summer of 2004, Wallace mentioned that her sister was interested in the position advertised in the 115 announcement. WAF, Tab 7, Subtab 4ad at 4. Grace's OIG affidavit does not claim that Wallace asked her if Martin's application for the 010 announcement could be used to

accord to the OPM regulation that was in effect during the relevant period. *See Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003) (the notable absence of explicit rulemaking authority must be weighed when determining the deference due to an agency regulation). Because we find, as set forth in the text, *infra*, that the agency failed to prove that Wallace violated the regulation by recommending or referring Martin for consideration by a public official standing lower in the chain of command, we need not resolve whether this OPM regulation is entitled to deference.

apply for other job openings; the only statements in Grace's affidavit regarding Martin's application relate to Grace's contacts with Martin, not Wallace. *Id.* at 5. Grace also told the OIG that, subsequent to Martin's e-mail inquiry about the status of the selection process for the 010 announcement, she pulled Martin's resume from her application for the 010 announcement, made a copy, wrote "PTO-04-115" on it, and gave it to Linda Majca, a human resources specialist, who then placed it for consideration with the other applications for the 115 announcement. *Id.* Further, Grace stated in her affidavit that she did not recall mentioning these actions to Wallace, nor did she recall speaking with Martin prior to passing her application on to Majca, although she noted that, after reviewing phone records provided by an investigator, she may have spoken once with Martin by telephone. *Id.* at 6. In June 2005, agency counsel deposed Grace, who reported that Wallace had come to her office, told her that she was disappointed that Martin had applied under the 010 announcement and that the announcement was being canceled without a selection, and Wallace further offered that Martin was "very interested" in the re-announced position and "was going to apply for it." WAF, Tab 7, Subtab 4p at 12. In the interview, Grace also contended that Wallace asked her if Martin could use the application for the 010 announcement to apply for the 115 announcement, to which Grace responded yes and told Wallace that she would get a copy and submit it to Majca. *Id.* at 24. However, in her hearing testimony, Grace testified that she may have "suggested that [Martin] could use the same application to apply" for the 115 announcement rather than Wallace asking her about re-submitting Martin's previous application. HT 5/23 at 166. Further, Grace could not recall during her hearing testimony whether she had asked Wallace or Wallace had asked her if Martin was interested in the 115 announcement. *Id.* at 188-89. Thus, the AJ's finding that Grace's sworn statements and testimony were consistent in this regard, ID at 8, is contrary to the weight of the evidence and does not reflect the record as a whole. Further, the AJ's analysis of the conversation between Grace and Wallace was incomplete

in that it completely ignored the testimony of another participant in the conversation, Andrea Wellington.

¶16 Recounting the same conversation, Wallace testified that she was in her office chatting with Andrea Wellington when Grace knocked on the door. HT 5/25 at 112. Wallace contended that Grace then told her that the position was going to be re-announced and asked her if her sister was interested in applying for the re-announced position, to which Wallace replied that she didn't know if Martin was interested because she hadn't talked to her about it and that Grace should ask Martin herself. *Id.* Wallace claimed that Grace then asked her if she had Martin's application or whether Martin wanted to submit the same application and Wallace replied that she did not have the application. *Id.* at 112-13. Wellington testified, consistent with Wallace's testimony, that the conversation in question took place in Wallace's office, that it was Grace who asked whether Martin was interested in the re-announced position and whether Wallace had a copy of Martin's application, and that Wallace replied that she did not know if her sister was interested and that she did not have a copy of her sister's application. HT 5/25 at 46. When Grace was confronted with the discrepancy between her version of the conversation and Wellington's version and asked which version of the conversation was correct, she could not say which version was accurate. HT 5/23 at 183. The AJ exhibited considerable frustration with Grace on this point, noted her conflicting answers regarding the conversation, asked her if "any of her recollections [were] going to be correct[.]" and commented, "I don't know what I'm going to do with this information." *Id.* at 187. However, the ID completely ignored Wellington's testimony that she was present at the time of the conversation in question and that her testimony was both consistent with Wallace's version and contradicted Grace's version of the conversation. While it is possible that the AJ considered the conflicting evidence in concluding that Grace was more credible than Wallace with respect to their conversation, "[his] finding contrary to a significant piece of evidence that has a

direct bearing on the case, without mentioning it, raises a question as to its consideration.” *Barrett v. Department of the Interior*, 54 M.S.P.R. 356, 362 (1992). Furthermore, the AJ’s primary reason for believing Grace over Wallace, namely, “Grace’s consistent sworn statements and testimony” regarding her conversation with Wallace, ID at 8, is not supported by the record. Accordingly, the record provides sound reasons for rejecting the AJ’s conclusion that Grace’s version of her conversation with Wallace was more credible than Wallace’s version. Furthermore, since Grace’s statements were the only evidence the agency offered in support of its allegations regarding this conversation, we find that the agency did not establish by preponderant evidence that Wallace referred Martin to Britt for consideration under the 115 announcement by directing Grace to submit Martin’s previous application for consideration under that announcement or that the impetus for the submission of Martin’s previous application for the 115 announcement came from Wallace, as opposed to Martin or Grace. *Cf. Ray v. Department of the Army*, 97 M.S.P.R. 101, ¶ 44 (2004) (the Board rejected the credibility findings on which the AJ relied in support of his conclusion that the agency failed to sustain a specification and sustained the specification upon determining that the testimonial evidence in support of the specification was more credible than the appellant’s version of the events), *aff’d*, 176 F. App’x 110 (Fed. Cir. 2006).

¶17 Regarding the conversations between Wallace and Britt in which the agency alleged that Wallace advocated the hiring of Martin when Wallace asked Britt about the composition of the interview panel for the candidates for the 115 announcement and subsequently “approved” and “affirmed” Britt’s selection of Martin, WAF, Tab 7, Subtab 4l, the record again fails to support the AJ’s finding that “Britt and Wallace confirmed all of these matters in their respective hearing testimonies,” ID at 8. Regarding their first conversation, Britt testified that she told Wallace who was on the panel, that Wallace had not asked, and that Britt’s OIG affidavit was incomplete on the point. HT 5/23 at 219-20. Wallace testified

that she asked Britt whether she was using a panel to interview candidates and Britt “went on to tell [her] who was on those panels[,]” but Wallace “did not ask [Britt] who was on the panel” for the position for which Martin applied. HT 5/25 at 117. Thus, contrary to the AJ’s finding, Britt’s and Wallace’s respective hearing testimonies contradict, rather than confirm, the agency’s specification that Wallace asked Britt who was on the interview panel for the position. Accordingly, we find that the agency failed to prove that Wallace advocated on behalf of Martin by asking Britt about the composition of the interview panel.

¶18 Regarding the second conversation between Wallace and Britt, the AJ found⁴ that Wallace approved Martin’s selection for the position when Wallace “both reviewed her sister’s application and inquired of Britt whether she had ‘properly’ made the selection.” ID at 8. However, the portions of the record which the AJ cited, excerpts from Wallace’s and Britt’s statements to agency investigators, do not support his finding that Wallace approved Martin’s selection. *See* WAF, Tab 7, Subtabs 4m at 23-25, 4o at 41. Rather, the record shows that, when Britt informed Wallace that Martin had been selected, Wallace advised her supervisor, Barnard, of the selection, and Barnard ultimately approved Martin’s selection by Britt. Britt testified that, when she came to Wallace to tell her that she had selected Martin under the 115 announcement, Britt understood that, “[b]ecause [Wallace] recused herself, [Wallace] would have to go to her superiors to talk to them about it[.]” HT 5/23 at 227. Wallace again testified, consistent with Britt’s testimony, that when Britt told her that Martin had been selected, she replied that she needed to speak with Buonkong and

⁴ Although the AJ found that Wallace’s review of Martin’s application, along with her asking Britt whether she made the selection properly, indicated that Wallace had “approved” Martin’s selection, ID at 8, we note that, if Wallace had reviewed Martin’s application and then disapproved Britt’s selection, Wallace may have violated 5 C.F.R. § 2635.502 because her disapproval may have constituted improper participation in the selection process.

Barnard to make sure that they approved of the selection. HT 5/25 at 121. Buonkong's testimony confirmed that Wallace met with her and that they went to Barnard to report that the panel had selected Martin for the position. *Id.* at 191-95. Buonkong testified that both she and Barnard, upon Wallace's assertion that she was not involved in the selection process, felt there was no problem with Martin's selection, in part because they "knew from an earlier interview [for the 110 announcement] that [Martin was] the best qualified candidate for the position."⁵ *Id.* at 196. Accordingly, even if the agency proved that Wallace reviewed Martin's application upon being advised that Britt selected Martin under the 115 announcement and asked Britt if the selection had been made properly, we find the agency failed to prove by preponderant evidence that such actions constituted an improper approval or endorsement of Martin's selection in contravention of the nepotism statutes, 5 U.S.C. §§ 2302(b)(7) and 3110. Because we have found that the agency has failed to prove by preponderant evidence that Wallace engaged in any of the actions described by the specifications in support of its charges regarding Wallace's alleged violations of these statutes, we do not sustain those charges. *See* 5 U.S.C. § 7701(c)(1)(B). Furthermore, because the only basis the agency alleged as its justification for canceling Martin's appointment was that the appointment was made as the result of a process in which Wallace's participation violated the nepotism statutes, our conclusion that the agency failed to prove that Wallace violated these statutes also results in a conclusion that the agency failed to sustain the basis for Martin's removal.

¶19 Regarding the combined charge that Wallace violated 5 C.F.R. § 2635.502 and therefore engaged in conduct unbecoming a federal employee, the regulation provides in pertinent part that, "[w]here an employee's participation in a

⁵ The parties stipulated that the selection panel for the 115 announcement also found Martin to be the best qualified candidate for the position. WAF, Tab 74 at 4.

particular matter . . . would raise a question in the mind of a reasonable person about [her] impartiality, the agency designee^[6] may authorize the employee to participate.” 5 C.F.R. § 2635.502(d). Further, “unless [she] receives prior authorization, an employee should not participate in a particular matter involving specific parties which [she] knows is likely to affect the financial interests of a member of [her] household, or in which [she] knows a person with whom [she] has a covered relationship^[7] is . . . a party[.]” 5 C.F.R. § 2635.501(a). While the regulation is “intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of [her] official duties[,]” the lynchpin of the regulation is the employee’s participation in the particular matter. *Id.* Thus, if the employee refrains from participation in the matter, the regulation is not implicated and the employee therefore is not required to take the steps dictated in the regulation to seek out ethics advice and obtain the approval of the agency’s designee. 5 C.F.R. § 2635.502(a).

¶20 In this case, the agency failed to establish by preponderant evidence that Wallace participated in Martin’s selection and appointment in any substantive manner. During the hearing, Grace and Britt, the two former subordinates of Wallace who were most closely involved in the process which led to Martin’s appointment, both testified that Wallace was not involved. *See* ¶ 10, *supra*. Further, these subordinates’ sworn statements to the OIG and to agency counsel buttress their hearing testimony. Grace’s OIG affidavit stated that it was her understanding that Wallace “did not counsel or ask for favors to affect the

⁶ An “agency designee” is any employee to whom the agency has delegated the authority to make any determination or approval under, or to take any other action required or permitted by, part 2635 of title 5 of the Code of Federal Regulations. 5 C.F.R. § 2635.102(b).

⁷ A “covered relationship” exists between an employee and “a relative with whom the employee has a close personal relationship.” 5 C.F.R. § 2635.502(b)(1)(ii). The appellants have not argued that their relationship is not “covered” under the terms of the regulation.

outcome, and only wanted her sister to receive a fair assessment.” WAF, Tab 7, Subtab 4ad at 5. In Grace’s subsequent sworn interview with agency counsel, she likewise asserted, “[A]s far as I knew there was no involvement [by Wallace] in the recruitment [for the 115 announcement] at all.” *Id.*, Subtab 4p at 31. Britt’s OIG affidavit asserted that she “did not conduct the selection process [for the 115 announcement] any differently just because a candidate was related to my supervisor.” *Id.*, Subtab 4z at 6. Her OIG affidavit further asserted that she “was under no pressure, overt or otherwise, from [Wallace] or others with regards to my selection.” *Id.* at 9. In her sworn interview with agency counsel, Britt also asserted that she felt no pressure from Wallace regarding Martin’s selection. *Id.*, Subtab 4o at 39. Because we have determined that the record does not reflect that Wallace actually participated in the hiring process for the 115 announcement, the agency failed to prove that Wallace violated the regulation by participating in the process without seeking prior authorization from agency ethics officials.

¶21 In addition to the specification that Wallace failed to seek ethics advice, the agency also alleged that Wallace “led senior officials to believe that [Wallace] had cleared [Martin’s] hire with the Office of General Counsel.” *Id.*, Subtab 4l at 5. However, the record does not support the AJ’s finding that Wallace had “misrepresented to Barnard and Bounkong that the propriety of [Martin’s] selection in OHR had been ‘approved’ by [OGC attorney] Michael Briskin.” *Id.* at 11. Bounkong testified that Wallace told her that “Briskin said that he doesn’t see any problems with the situation since [Wallace] had recused herself from the process.” HT 5/24 at 150. Briskin testified that, based on Wallace’s assertion that Martin was selected by her subordinate and that Wallace was not involved in the process, he told Wallace that he saw no problems with the nepotism statute. HT 5/25 at 26, 40-41. Thus, the record does not establish that Wallace materially misrepresented Briskin’s advice. Although Briskin saw potential ethics issues related to Martin’s appointment, primarily in regard to Martin’s serving in Wallace’s chain of command, those issues were unrelated to any alleged violation

of the nepotism statute with regard to Martin's selection. *Id.* at 27. Further, Bounkong testified that she and Barnard had already decided in connection with the 010 announcement that, if Martin were hired, Martin would be detailed out of OHR until Wallace left her OHR detail to return to her position in the patent corps, in order to ensure that Martin would not serve in Wallace's chain of command and to remove the primary ethics problem that Briskin identified. HT 5/24 at 160-61. Further, the record indicates that the agency detailed Martin out of OHR upon her selection. WAF, Tab 7, Subtab 4ap. Briskin also acknowledged that Wallace had no duty under the circumstances to seek ethics advice. WAF, Tab 7, Subtab 4v at 3. Finally, because we have already found that the agency failed to establish that Wallace engaged in any of the actions described by the specifications in support of its charges regarding Wallace's alleged violations of the nepotism statutes, *see* ¶¶ 13-17, *supra*, specifications which the agency also cited in charging the appellant with conduct unbecoming a federal employee, WAF, Tab 7, Subtab 4l at 4-5, we find that the agency has failed to establish that charge as well.

¶22 Regarding the appellants' affirmative defenses, the AJ found that they failed to prove their claims of discrimination on the basis of sex and that Martin failed to prove her claim of retaliation for prior EEO activity. ID at 12-17. The appellants did not challenge the AJ's findings concerning Martin's retaliation claim, and, with regard to their claims of sex discrimination, their PFR fails to establish that there is new, previously unavailable, evidence or that the AJ made an error in law or regulation that affects the outcome with respect to these claims. Thus, the appellants' PFR provides no basis to overturn the AJ's conclusion that the appellants failed to establish their retaliation and discrimination affirmative defenses. *See* 5 C.F.R. § 1201.115(d). Nevertheless, having determined that the agency failed to sustain the charges against the appellants, we REVERSE the initial decision and ORDER the agency to restore the appellants to their respective positions.

ORDER

- ¶23 We ORDER the agency to cancel the removal action and to restore Valencia Martin Wallace effective August 29, 2005. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.
- ¶24 We also ORDER the agency to reinstate Jacintha M. Martin effective October 18, 2005. *Id.* The agency must complete this action no later than 20 days after the date of this decision.
- ¶25 We also ORDER the agency to pay the appellants the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellants to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellants the undisputed amount no later than 60 calendar days after the date of this decision.
- ¶26 We further ORDER the agency to tell the appellants promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellants, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).
- ¶27 No later than 30 days after the agency tells the appellants that it has fully carried out the Board's Order, the appellants may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellants believe that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellants believe that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶28 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

¶29 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANTS
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANTS REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the

United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the

United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.